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April 23, 1992

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Ms. Donna Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

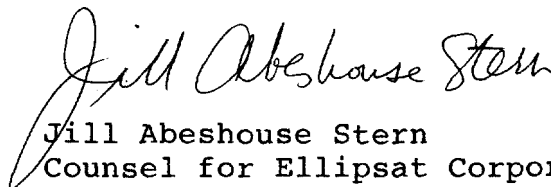
Re: Requests for Pioneer's Preference  
ET Docket Nos. 92-28; PP-29; PP-30;  
PP-31; PP-32; PP-33

Dear Ms. Searcy:

On behalf of Ellipsat Corporation, I am transmitting here-  
with an original and four copies of "Response to Oppositions and  
Reply to Comments" with respect to the above-referenced  
proceeding.

Should there be any questions concerning this matter, kindly  
communicate with the undersigned.

Sincerely,

  
Jill Abeshouse Stern  
Counsel for Ellipsat Corporation

JAS:csg

Enclosures

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In the Matter of	)	
	)	
Amendment of Section 2.106 of the	)	ET Docket No. 92-28
Commission's Rules to Allocate	)	
Spectrum to the Mobile-Satellite	)	PP-29
Service above 1 GHz for	)	PP-30
Low-Earth Orbit Satellites --	)	PP-31
Requests for Pioneer's Preference	)	PP-32
by Constellation, Ellipsat, Loral,	)	PP-33
Motorola, and TRW.	)	

RESPONSE TO OPPOSITIONS AND REPLY TO COMMENTS

ELLIPSAT CORPORATION

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Its Attorneys

April 23, 1992

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### SUMMARY

In the comments that were filed on April 8, 1992, no one refutes the significance of the fact that Ellipsat was the first entity to develop and file a concrete proposal for a combined mobile voice/RDSS service using small elliptical low-earth orbit satellites in the RDSS bands. A satellite system proposal is a complex undertaking that requires significant technical and market expertise, and no one has suggested otherwise. Ellipsat's pioneering use of small, elliptical orbiting satellites will yield significant cost reductions for the public. Accordingly, if the Commission should award a pioneer's preference in this proceeding, Ellipsat is the appropriate recipient. None of the other low-earth orbit applicants -- all of which filed applications up to seven months after Ellipsat and used Ellipsat's system approach as a blueprint for their later-filed proposals -- is entitled to a preference.

All of the parties in this proceeding are united, and properly so, in their vigorous opposition to Motorola's preference request. There is unanimous agreement that the Motorola system is inefficient, overly complex, and prohibitively expensive. Equally important, the Motorola system is not innovative and essentially involves a repackaging of existing technology as the other parties have also emphasized.

Unanimous concern has also been expressed that a preference award to Motorola will have an anti-competitive effect,

precluding the other satellite system proposals. The parties correctly point out that a preference award would bestow a monopoly on Motorola, and exclude other domestic and foreign entities from entering and competing in the RDSS/MSS bands, due to Motorola's technical inability to share the spectrum with other systems.

The oppositions further illustrate the dangers, from a public interest standpoint, of allowing the preference to skew the outcome of critical rulemaking proceedings, and to abrogate the Commission's duty to refer to the public interest standard in licensing new systems. Contrary to well-established rules of administrative conduct, a preference award to Motorola would effectively preclude public comment on such key policy issues as whether to preserve the existing spread spectrum approach in the relevant frequency bands. Strong concern was also expressed by the parties that a preference award to Motorola would violate the due process rights of the other applicants to comparative consideration of their proposals.

Consistent with the unanimous oppositions filed in this proceeding, the Commission must deny a preference award to Motorola as contrary to the fundamental due process rights of the other applicants and long-standing pro-competitive policies in the satellite field. For reasons detailed herein and in Ellipsat's previous submissions, if a preference should be awarded in this proceeding, Ellipsat should receive that preference as the first to develop a concrete system proposal.

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WASHINGTON, D.C. 20554

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by Constellation, Ellipsat, Loral, ) PP-33  
Motorola, and TRW. )

To: The Chief Engineer

RESPONSE TO OPPOSITIONS AND REPLY TO COMMENTS

Ellipsat Corporation ("Ellipsat") , by its attorneys, hereby submits its response to oppositions and reply to comments with respect to the above-referenced pioneer's preference requests of Ellipsat, Motorola Satellite Communications, Inc. ("Motorola"), Constellation Communications, Inc. ("Constellation"), Loral Qualcomm Satellite Services, Inc. ("Loral") and TRW Inc. ("TRW").

I.  
INTRODUCTION

If a pioneer's preference is awarded in this proceeding, Ellipsat is the appropriate recipient of that preference. Nothing in the oppositions and comments filed April 8, 1992 would preclude an award to Ellipsat. Indeed, all of the other parties

have admitted that Ellipsat was the first to file a concrete system proposal. Motorola alone seeks to discredit the significance of this event. The fact remains, however, that Ellipsat was the first entity to develop a concrete system proposal and to seek authority to implement a LEO system using the RDSS bands to provide combined RDSS and mobile voice services.<sup>1/</sup>

This is not a case where an applicant files a form application in order to qualify for a preference. A satellite application is a complex undertaking, involving significant research and expertise to develop a system proposal. Ellipsat drew upon extensive resources to develop its proposal, including the technical and market experience of its Chairman, David Castiel, and one of its stockholders, Interferometrics. Interferometrics has substantial experience in the design and development of small satellite systems that surpasses Motorola's and pre-dates Motorola's announcements about Iridium.

Motorola never publicly announced an intention to use the RDSS bands or, even, to offer RDSS services, prior to Ellipsat's November 1990 filing. Ellipsat was the first to identify the underutilized RDSS bands as an appropriate place for a LEO system, and to develop its satellite system concept as an

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<sup>1/</sup> See Application of Ellipsat Corporation, filed November 5, 1990 and Technical Clarification and Erratum, filed January 30, 1991 (FCC File No. 11-DSS-P-91(6) (hereinafter "ELLIPSO" I Application). See also Application of Ellipsat Corporation filed June 3, 1991 (FCC File No. 18-DSS-91 (18) (hereinafter "ELLIPSO" II Application)).

enhancement of the existing RDSS. These were Ellipsat innovations, which were essentially copied by all of the applicants. The Commission cannot seriously consider a preference award to Motorola or any of the other applicants, particularly those who filed some seven months after Ellipsat, given the fact that all of these applicants were able to utilize the concept and information developed by Ellipsat as a blueprint.

While there is no justification to award a preference to any of the applicants except Ellipsat, an award to Motorola would cause unique harm to the public interest. This prospect has united all of the parties and, on April 8, 1992, Oppositions to Motorola's pioneer's preference request were filed by the five other applicants for satellite systems above 1 GHz: Loral,<sup>2/</sup> TRW,<sup>3/</sup> Constellation,<sup>4/</sup> AMSC,<sup>5/</sup> and Ellipsat.<sup>6/</sup> In their respective Oppositions, these parties unanimously urge the Commission not to award a preference to Motorola. All of the other parties

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<sup>2/</sup> Opposition to Motorola's Request for Pioneer's Preference, filed April 8, 1992 (hereinafter "Loral Opposition").

<sup>3/</sup> Opposition to Pioneer's Preference Request of Motorola Satellite Communications, Inc. filed April 8, 1992 (hereinafter "TRW Opposition").

<sup>4/</sup> Opposition to Pioneer's Preference Request of Motorola Satellite Communications, Inc. filed April 8, 1992 (hereinafter "Constellation Opposition").

<sup>5/</sup> Consolidated Opposition to Requests for Pioneer's Preference, filed April 8, 1992 (hereinafter "AMSC Opposition").

<sup>6/</sup> Opposition to Pioneer's Preference Request of Motorola Satellite Communications, Inc., filed April 8, 1992 (hereinafter "Ellipsat Opposition").



agree with Ellipsat that Iridium essentially repackages existing technology, and therefore does not merit a preference. The other parties also raise the concern, shared by Ellipsat, that a preference award to Motorola would contravene the Commission's public interest obligations under the Communications Act and the Administrative Procedure Act, and would preclude competition contrary to long-standing Commission policies.

Conclusive evidence has been presented by the parties that Motorola has not proposed anything innovative. Iridium uses technology previously developed by the Department of Defense and NASA, among others. In addition, the Commission cannot ignore the serious questions that have been raised by the parties about the technical feasibility and economic viability of the Iridium system. As the Oppositions correctly point out, the pioneer's preference must be considered in a real-world context, not a theoretical vacuum. Technical gimmickry is irrelevant. A preference is merited only where the proposed technology or service can, and will, be implemented. Otherwise, a preference award may thwart introduction of other beneficial services to the public, contrary to the very purpose underlying the preference.

The Commission must also consider the unique circumstances of the present case -- circumstances that do not appear to have been contemplated when the pioneer's preference was adopted. Most importantly, the present proceeding involves significant unresolved policy questions, resulting from Motorola's efforts to

override and reverse the current spread spectrum and same-direction scheme that the rules now authorize in the relevant frequency bands. The Commission must resolve these critical issues on the basis of public comment, not through the back-door of a preference award.

Equally significant, however, is the likelihood that a preference award to Motorola could have a major impact on the financial community and, ultimately, the public that benefits from new services. The Commission should not allow the preference to distort the outcome of this proceeding, and "freeze-out" the entrepreneurial companies that the preference was designed to help and protect.<sup>7/</sup>

II.  
AS THE FIRST TO DEVELOP  
A CONCRETE SYSTEM PROPOSAL,  
ELLIPSAT SHOULD RECEIVE A PIONEER'S PREFERENCE

If the Commission should award a preference in this proceeding, there are compelling reasons to award that preference to Ellipsat. Award of a pioneer's preference to Ellipsat is fully consistent with the objectives underlying the pioneer's preference and with the current regulatory scheme. Unlike Motorola, a

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<sup>7/</sup> One need only look at the voluminous amount of publicity that Motorola generated between June and October 1990 about Iridium (copies of which were submitted with its supplemental request) to appreciate the formidable nature of Motorola's public relations machinery, and the likely grist that an award would provide for the mill.

preference award to Ellipsat would still permit licensing of multiple domestic and international systems in the relevant bands.

Most importantly, however, Ellipsat was the first party to develop a concrete system proposal for combined MSS/RDSS services in the RDSS bands using low-earth orbit satellites, and to submit an application to the Commission to authorize that system. No one disputes these facts.

Ellipsat was the first to propose commercial mobile satellite voice services using CDMA techniques; the first to propose the use of low-earth orbits and a constellation of small, inexpensive satellites to provide MSS and RDSS; the first to propose a commercial application of elliptical orbits, in order to allow more efficient use of each satellite, to obtain good coverage of the prime service area using fewer satellites, to reduce waste of constellation resources over non-served areas and to avoid subsidy of service to foreign areas by U.S. consumers; and the first to propose integration of its mobile satellite telephone services with terrestrial cellular telephone services and as a means of extending mobile telephone services to areas otherwise unreachable or unreachable by terrestrial cellular services. In addition, Ellipsat's system will yield cost reductions to the public and will facilitate spectrum sharing, thus meeting two additional

criteria that the Commission indicated are relevant to the preference.<sup>8/</sup>

It is Ellipsat's unique combination of technology in a highly innovative and spectrum-efficient fashion that merits a preference. Indeed, Ellipsat's use of state-of-the-art technology ensures that the proposed system will be technically achievable at the projected costs. As Ellipsat indicated in its April 8, 1992 submission, four major aerospace companies, the remaining contestants for construction of the ELLIPSO™ system, have reviewed and corroborated the technical and economic feasibility of the ELLIPSO™ system. Ellipsat has no doubt that the feasibility of its approach would be further confirmed by the "peer review" authorized in the pioneer's preference decisions, if such review should be deemed necessary by the Commission.

While the timing of an application may not be the sole criterion for a preference, the fact that Ellipsat filed first is clearly significant in this proceeding. Although Motorola released an avalanche of press clippings prior to Ellipsat's filing, it did not file an application until nearly a month after Ellipsat. This suggests that Motorola had not yet developed the specifics of its system proposal when Ellipsat filed. Moreover, Motorola never announced an intention to seek licensing in the

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<sup>8/</sup> Report and Order, GEN Docket No. 90-217, 6 FCC Rcd 3488, 3494 (1991)(hereinafter "Pioneer's Preference Order"); Low-Earth Orbit Satellite System (Pioneer's Preference), 70 R.R. 2d 467, 469 (1992)(hereinafter "Tentative Decision.")

RDSS band and never publicly proposed to offer RDSS services prior to Ellipsat's application. In fact, there was great speculation as to which band Motorola might propose and many assumed, based on public announcements by Motorola, that Motorola intended to use the Inmarsat band. This assumption was given credence by Motorola's memorandum of understanding with Inmarsat, and Motorola's interest in having Iridium considered as a future generation Inmarsat system.<sup>9/</sup>

While Motorola was busy making public announcements, Ellipsat undertook to develop and file the first application at the Commission to propose use of the RDSS band and the first to propose combined RDSS and mobile voice services using low-earth orbit satellites. Ellipsat prepared and filed an application in November 1990 without reference to any other application. Its proposal is fundamentally different from Motorola's in a number of critical respects, including deployment strategy deriving from the elliptical orbits, access techniques, market definition and cost of service. Significantly, all of the other shared spectrum applicants have mirrored Ellipsat's approach, rather than Motorola's.

Motorola cannot minimize the importance of the actual filing of a satellite application, despite its efforts to do so. In the context of a satellite system, an application is a complex

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<sup>9/</sup> Motorola even signed an agreement with AMSC, indicating that it was still developing a business approach even after publicly announcing the Iridium concept.

undertaking that requires definition of the parameters and specifications of the system. Satellite applicants are required to set forth a detailed description of their proposed system design and technology. In developing all aspects of its system proposal, Ellipsat utilized the extensive technical and marketing experience of its principals. For example, Interferometrics, an Ellipsat stockholder, has contributed to the development of small satellites in far more significant respects than Motorola. Interferometrics was involved in the design of the miniature Eyesat-class satellites launched by AMSAT in 1990, and can thus point to developmental work in this field that pre-dates and surpasses Motorola's.

Ellipsat is the type of innovative company that the Commission sought to reward when it adopted the pioneer's preference. In reality, a valid market approach must always be a key component of any pioneering application at the Commission. It is not enough to develop a new technology; the innovator must also perceive the best market use for the technology and adapt the technology to meet the market. In other words, it is the application of the technology to a specific public need, in an innovative fashion, that merits a preference, not merely the development of the technology. Ellipsat perceived the possibilities in the technology, and developed an innovative system approach to meet a real market need.

In sum, the facts and the equities dictate that, if a preference should be awarded, Ellipsat is the appropriate recipient. There is no justification whatsoever to award a preference to any of the other companies who filed after Ellipsat. These companies had a road map provided by Ellipsat. In addition these companies had a leisurely opportunity to study Ellipsat's information and approach -- for up to seven months -- in developing their own applications.<sup>10/</sup>

III.  
THERE IS UNANIMOUS OPPOSITION  
TO MOTOROLA'S PREFERENCE REQUEST

All of the parties -- Ellipsat, TRW, Loral, Constellation and AMSC -- have opposed Motorola's preference request. Significantly, these parties agree that Iridium is not entitled to a pioneer's preference for two reasons: (1) Iridium is not innovative within the meaning of the preference; and (2) the Commission's pro-competitive policies and the due process rights of the other applicants preclude a preference award to Motorola.

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<sup>10/</sup> Ellipsat expressly opposes the preference requests of Loral, TRW and Constellation, all of which filed applications on June 3, 1991, and had seven months after Ellipsat's application was filed to analyze Ellipsat's application and develop their own system proposals. None of these applications can be considered pioneering given that indisputable fact.

- A.    The Parties Agree that  
      Motorola's System Is Not Innovative
- 1.    Iridium Repackages Existing  
      Technology in an Inefficient Fashion

The Oppositions provide abundant evidence in support of Ellipsat's position that Iridium is essentially a repackaging of existing technology and not an optimum one at that. In its Opposition, Ellipsat pointed out that key Motorola system features, including inter-satellite links, bi-directional operation, multiple beam arrays, on-board signal processing and frequency reuse, have all been utilized in other satellite systems.<sup>11/</sup> Ellipsat and others have noted the similarities between Iridium and the Milstar Satellite System developed by the Department of Defense and NASA's Tracking Data and Relay Satellite System.

Iridium's lack of novelty was challenged by the other parties. TRW, for example, calls Iridium "an amalgamation of advances pioneered by others."<sup>12/</sup> Constellation points out that Motorola "has not developed any of the basic technology that underlies the Iridium system."<sup>13/</sup> Similarly, Loral concludes that "the Motorola system does not involve innovation because Motorola did not develop LEO technology (used by the Department

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<sup>11/</sup> See Ellipsat Opposition at 10-14.

<sup>12/</sup> See TRW Opposition at 13, 11-13. See also Loral Opposition at 4-5; Constellation Opposition at 8; AMSC Opposition, Technical Statement at 3-4.

<sup>13/</sup> Constellation Opposition at 8.



of Defense for many years), intersatellite crosslinks (developed by NASA and used in connection with TDRSS satellites), or bidirectional capabilities (used in radar and in military systems)."<sup>14/</sup>

In fact, most of the "innovations" that Motorola claims are, in fact, the normal system features that any satellite system would require. For example, it is surprising that Motorola would seriously claim its "power management system" as an innovative feature.<sup>15/</sup> Any satellite constellation must have a power management system. Indeed, Motorola's power management system, which it claims will turn off overlapping cells as satellites approach the polar regions, actually reveals the inefficiencies of its system design. This power management is required because Iridium essentially creates a "traffic jam" of unneeded satellites in the polar regions, thus making thousands of channels available to serve Antarctica. Iridium needs a power management system to shut off these unwanted channels.

This illustration underscores the need to consider the preference in a real-world context. Motorola cannot seek the FCC's blessing for system design features that are developed without regard to market needs and demand. Motorola's business decision to develop a system that deploys thousands of channels around the

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<sup>14/</sup> Loral Opposition at 4-5.

<sup>15/</sup> See Supplement to Request for Pioneer's Preference, filed April 10, 1992, at 7.

world has, in fact, been questioned. An "innovative" response to technical problems created by a system's overly complex and costly features is surely not entitled to public reward.

2. Motorola's "Supplemental" Request  
Must Be Disregarded

Given Motorola's use of previously-developed technologies, and the system inefficiencies discussed above, it does not deserve a preference. As the Commission is aware, Motorola filed new materials and a "supplemental" preference request on April 10, 1992, after the comment date in this proceeding. Ellipsat has moved to strike this supplemental filing or to establish new comment dates.<sup>16/</sup> Ellipsat has assumed that, at a minimum, new comment dates will be established in order to permit the parties to evaluate and comment upon Motorola's supplemental filing. Based upon a preliminary review, however, there does not appear to be any information that affects Ellipsat's conclusions about Motorola's lack of innovation.

While Ellipsat intends to respond in greater detail when new comment dates are established, it should be noted that Motorola's

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<sup>16/</sup> See "Motion to Strike Supplement to Preference Request or, Alternatively, to Establish New Comment Dates", filed April 21, 1992 by Ellipsat Corporation. As detailed in that motion, the Motorola submission, which contains confidential materials, is a new preference request that should be stricken or placed on public notice. In a separate opposition, also filed April 21, 1992, Ellipsat opposed Motorola's request for confidential treatment on the grounds, inter alia, that Motorola's submission violates the ex parte rules.

reliance in the supplement on its patent applications is irrelevant. All of the applicants are no doubt in the process of seeking patents for unique system features or will need to do so as development proceeds. This patent process has no bearing on the pioneer's preference process, particularly where some of the system features for which Motorola seeks patents (e.g., power system management) are necessitated only because of unnecessary complexities and inefficiencies in Motorola's design.

In addition, the Commission has expressly stated that the preference "serves communications goals that stand independent of the patent laws."<sup>17/</sup> The Commission has made clear that while patents apply to "equipment and specific services, such as call protocols," the preference addresses "broad-based radio services" which are not patentable.<sup>18/</sup>

B. Valid Concerns are Raised That An Award to Motorola Would Create a Monopoly

The preservation and promotion of competition is a central theme in the Commission's treatment of the pioneer's preference. In adopting the preference, the Commission repeatedly endorsed the paramount objective of ensuring "competition and availability of services to the public."<sup>19/</sup> To that end, the Commission made

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<sup>17/</sup> Pioneer's Preference Order at 3490.

<sup>18/</sup> Id.

<sup>19/</sup> Id. at 3492.

clear that it does "not intend to award a pioneer a nationwide monopoly or a service and thereby exclude others from providing that service."<sup>20/</sup>

In opposing Motorola's preference, all of the parties raised valid concerns about the potentially anti-competitive effect of a preference award to Motorola. Contrary to the Commission's express desire not to allow the preference to create a monopoly, the parties expressed the unanimous fear that a preference to Motorola would effectively preclude implementation of the other system proposals and grant a de facto monopoly to Motorola.<sup>21/</sup>

A monopoly would be created for the simple reason that Motorola's system cannot technically share the available spectrum with any of the applicants, or with any other international systems including GLONASS. As a result, a preference award to Motorola would mean that only Motorola could ultimately be licensed. The other systems, and the new beneficial services to the public that they would provide, would be precluded. This result would be contrary to the Commission's express intentions in adopting a preference.

While Motorola has proposed to "split" the band with other systems, this segmentation approach is a thinly veiled attempt by Motorola to grab the most desirable L-Band spectrum for itself.

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<sup>20/</sup> Id. at 3490.

<sup>21/</sup> See, e.g., TRW Opposition at 4-8; Constellation Opposition at 2-3; Loral Opposition at 6.

Segmentation does not contemplate true sharing between multiple system operators, and contradicts Motorola's earlier claims about co-existence.<sup>22/</sup>

Consistent with the pioneer's preference decisions, when the Commission balances the goals of innovation and competition, competition and diversity must prevail.<sup>23/</sup> For this reason, the Commission must err on the side of competition in administering the preference. It is therefore evident that, even if Motorola's system were to be viewed as innovative (despite strong evidence to the contrary), the anti-competitive effects of a preference award to Motorola outweigh any such innovation and offer dispositive grounds to reject Motorola's preference request.

Award of a preference to Motorola at this stage would potentially foreclose the other system proposals and the benefits of competition to the public. Thus, while a preference to Motorola is not justified in any event, the Commission must come down on the side of competition (and due process) in the present circumstances. A contrary result would artificially skew the

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<sup>22/</sup> While Motorola makes the self-serving and misleading statement that it only seeks one-third of the RDSS spectrum, this statement is based on Motorola's disinterest in the S-band RDSS spectrum. Motorola plans to operate bi-directionally in the L-Band, and not to use the S-Band for downlinks. In fact, Motorola wants 10 MHz of "prime" L-Band spectrum for its exclusive use, leaving 6 MHz for the remaining four LEO applicants.

<sup>23/</sup> Memorandum Opinion and Order, GEN Docket No. 90-217, FCC 92-57, released February 26, 1992 at ¶ 29 (hereinafter "Reconsideration Order."); Pioneer's Preference Order at 3492, ¶ 34.

Commission's licensing proceedings to the ultimate detriment of the public who will be deprived of the recognized benefits provided by diverse services and system operators.

C. Award of a Preference to Motorola  
Would Violate Due Process

The subject proceeding raises unique issues that mandate against a preference award to Motorola. The Commission is required here to consider multiple preference requests that involve mutually exclusive applicants and unresolved policy issues. This factual situation creates a very real danger that a preference award to Motorola could effectively resolve the critical underlying policy issues that the Commission faces, in a way which is contrary to fundamental due process rights.

The Commission has never addressed a comparable factual situation in a pioneer's preference context.<sup>24/</sup> In awarding a preference to VITA in the "little" LEO proceeding, the Commission expressly found that the VITA award had no effect on licensing of the other systems.<sup>25/</sup> In contrast, this situation involves four applications that can readily be made compatible and a fifth application -- Motorola's -- that cannot and will not share the spectrum with the other applicants or with other users.

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<sup>24/</sup> For this reason, further reconsideration of the Pioneer's Preference Order has been sought. See Petition For Further Reconsideration, GEN Docket No. 90-217, filed by TRW Inc. on April 6, 1992.

<sup>25/</sup> Tentative Decision at 469.

In adopting the preference, the Commission assumed that it would merely provide a "certainty that an otherwise qualified applicant will be able to participate in the proposed service."<sup>26/</sup> It did not intend to preclude other systems and service providers, as would be the case if Motorola were awarded a preference. Nor did the Commission anticipate that one of the applicant's proposals would be technically incompatible with all of the other proposals, as is also the case here.

Because of the unique factual situation before the Commission, all of the parties have raised concerns that an award to Motorola creates the potential danger that fundamental statutory and constitutional due process rights will be violated. The Commission is required under the Communications Act to consider the public interest in deciding whether to grant a license application.<sup>27/</sup> That statutorily mandated public interest determination necessarily supersedes the pioneer's preference. The pioneer's preference was never intended to provide an "end-run" around the Commission's licensing procedures. The preference cannot be a substitute for the Commission's licensing decisions that are based upon a public interest standard.

In addition, the Commission's rulemaking authority is constrained by well-established administrative safeguards.<sup>28/</sup> Thus,

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<sup>26/</sup> Reconsideration Order at ¶ 29.

<sup>27/</sup> See 47 U.S.C. § 309.

<sup>28/</sup> See 5 U.S.C. §§553, 554.

to the extent that the Commission proposes to review its previous policy determinations with respect to the benefits of spread spectrum in order to accommodate Motorola, it must do so in a legally appropriate fashion. The Commission cannot shirk its responsibility under the Administrative Procedure Act to consider this important policy issue in the context of a deliberate rule-making or adjudicative proceeding. Under these long-standing principles of agency conduct, the Commission cannot inadvertently resolve fundamental and controversial policy issues by awarding a preference.<sup>29/</sup>

Finally, as the parties have all emphasized, a preference award to Motorola could violate the Ashbacker rights of the other applicants.<sup>30/</sup> The Commission is obligated to provide all mutually exclusive applicants with comparative consideration. As TRW and others have correctly pointed out, a preference award to Motorola could prejudice both the licensing and rulemaking proceedings, by denying the consideration of other system proposals that is required under Ashbacker.<sup>31/</sup>

In short, award of a preference to Motorola would abrogate fundamental due process rights of the applicants, and transgress the bounds of agency authority under the Communications Act and

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<sup>29/</sup> See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.) cert. denied, 403 U.S. 923 (1971).

<sup>30/</sup> Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

<sup>31/</sup> See TRW Opposition at 17-21. See also Constellation Opposition at 9-10.



the Administrative Procedure Act. These due process rights and the Commission's licensing responsibilities clearly outweigh the pioneer's preference, and require denial of Motorola's preference request.

D.    An Award to Motorola Could Have a Chilling  
      Effect on Investment in the Other Applicants

Equally troublesome is the potentially adverse impact that a preference would have on the financial community and, ultimately, the public. If a preference were awarded to Motorola, there is no doubt, based on Motorola's previous use of the media to promote its system, that any such award would become a major public relations event. The financial community and the public, which may not understand the subtleties of FCC practice, could easily misread the nature of the preference. (Indeed, it is not entirely clear to FCC practitioners what the preference means.) This likely use of the preference, to influence the financial community and strategic partners, would be particularly damaging to smaller companies which by their nature are more vulnerable to market perceptions.

The Commission already has affirmed its sensitivity to small and entrepreneurial companies in the pioneer's preference